

1986

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Recommended Citation

Jeffrey A. Shapiro, *The Inadequate Police Protection of Battered Wives: Can a city and its police be held liable under the equal protection clause?*, 14 Fordham Urb. L.J. 417 (1986).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol14/iss2/3>

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THE INADEQUATE POLICE PROTECTION OF BATTERED WIVES: CAN A CITY AND ITS POLICE BE HELD LIABLE UNDER THE EQUAL PROTECTION CLAUSE?

I. Introduction

"Victim stated the first argument started over a pack of cigarettes. Victim stated accused (her husband) held her against the bathroom wall by the hair and continued to beat victim with his right hand. Victim is six months pregnant at this time. Victim stated accused kept telling victim, 'Bitch, you are going to lose that baby,' and then accused would beat the victim in the stomach again."¹

Wife abuse is a major social and criminal problem in the United States,² victimizing at least 1.8 million³ and perhaps as many as six

1. Eisenberg & Micklow, *The Assaulted Wife: "Catch 22" Revisited*, 3 WOMEN'S RTS. L. REP. 138, 139 (1977) (quoting 4.1 Assaults, Felonious, File #41, complaint #13626, July 1974, Washtenaw County Sheriff's Dept., Ann Arbor, Mich.) [hereinafter cited as Eisenberg & Micklow].

2. Wife abuse in the United States has been the focus of many recent books and reports. See, e.g., M. BORKOWSKI, M. MURCH & V. WALKER, *MARITAL VIOLENCE: THE COMMUNITY RESPONSE* (1983); L. BOWKER, *BEATING WIFE-BEATING* (1983); J. COSTA, *ABUSE OF WOMEN: LEGISLATION, REPORTING AND PREVENTION* (1983); T. DAVIDSON, *CONJUGAL CRIME: UNDERSTANDING AND CHANGING THE WIFEBEATING PATTERN* (1978); R. DOBASH & R. DOBASH, *VIOLENCE AGAINST WIVES* (1979); J. FLEMING, *STOPPING WIFE ABUSE: A GUIDE TO THE EMOTIONAL, PSYCHOLOGICAL, AND LEGAL IMPLICATIONS FOR THE ABUSED WOMAN AND THOSE HELPING HER* (1979); J. GILES-SIMS, *WIFE BATTERING: A SYSTEMS THEORY APPROACH* (1983); K. HOFELLER, *BATTERED WOMEN, SHATTERED LIVES* (1983); LAW ENFORCEMENT ASSISTANCE ADMIN., U.S. DEP'T OF JUSTICE, *PROSECUTOR'S RESPONSIBILITY IN SPOUSE ABUSE CASES* (1980); L. LERMAN, *PROSECUTION OF SPOUSE ABUSE: INNOVATIONS IN CRIMINAL JUSTICE RESPONSE* (1981); S. MORGAN, *CONJUGAL TERRORISM: A PSYCHOLOGICAL AND COMMUNITY TREATMENT MODEL OF WIFE ABUSE* (1982); E. OLSON & K. PETERSEN, *NO PLACE TO HIDE—WIFE ABUSE: ANATOMY OF A PRIVATE CRIME* (1982); M. PAGELOW, *WOMAN-BATTERING: VICTIMS AND THEIR EXPERIENCES* (1981); M. ROY, *THE ABUSIVE PARTNER: AN ANALYSIS OF DOMESTIC BATTERING* (1982); S. SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* (1982); E. STANKO, *INTIMATE INTRUSIONS: WOMEN'S EXPERIENCES OF MALE VIOLENCE* (1985); *THE VICTIMIZATION OF WOMEN* (J. Chapman & M. Gates ed. 1978); U.S. COMM'N ON CIVIL RIGHTS, *UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE* (1982); C. WILSON, *VIOLENCE AGAINST WOMEN: AN ANNOTATED BIBLIOGRAPHY* (1981).

3. See Finesmith, *Police Response to Battered Women: A Critique and Proposals for Reform*, 14 SETON HALL L. REV. 74, 77 (1983) [hereinafter cited as Finesmith]. A 1978 study yielded this estimate. *Id.*

million women⁴ every year. Until the late nineteenth century, Anglo-American law afforded the battered wife little or no protection.⁵ Characteristic of the long-held attitude of American law toward the battered wife is an 1824 decision by the Supreme Court of Mississippi that reaffirmed a husband's old common law "right" to physically discipline his spouse "without being subjected to vexatious prosecutions, resulting in the mutual discredit and shame of all parties concerned."⁶ While American law today no longer exempts from "vexatious prosecutions" for assault and battery a husband who attacks his wife,⁷ many jurisdictions still fail to provide adequate protection for the battered wife, particularly at the basic level of police response.⁸

Despite the belief and preference of some people that police respond to the crime of wife battering by enforcing the law against the wife batterer,⁹ the policy of many jurisdictions is to encourage non-arrest or mediation by police officers.¹⁰ In one survey it was found that less than twenty-five percent of the jurisdictions examined require the full enforcement of the law and the arrest of the wife batterer.¹¹

4. See *id.* at 77 n.24. A 1983 report estimated this figure. *Id.* Finesmith defines wife abuse as violence perpetrated by a man against a woman with whom he has, or had, an intimate spousal relationship, whether legal or nonlegal. *Id.* at 76 n.10. This note follows the Finesmith definition.

5. See Eisenberg & Micklow, *supra* note 1, at 138-39.

6. *Bradley v. State*, 2 Miss. (1 Walker) 156, 158 (1824).

7. See Woods, *Litigation on Behalf of Battered Women*, 5 WOMEN'S RTS. L. REP. 7, 8 (1978) [hereinafter cited as Woods]. This is so unless he "simply" rapes her. "Generally state law does not consider rape of a woman by her husband to be a criminal act. . . . Some states explicitly exclude the husband's rape of his wife in the text of the criminal code. . . . Other states do so by case law or common law." *Id.* at 8 n.7.

8. See Finesmith, *supra* note 3, at 84-101; U.S. COMM'N ON CIVIL RIGHTS, UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 12-22, 91-93 (1982) [hereinafter cited as RULE OF THUMB]. It should be noted that by no means do the police bear full responsibility for the inadequate protection of battered wives by law enforcement officials: "Police are reluctant to arrest abusers and when they do, prosecutors avoid charging them. Courts have also contributed to underenforcement of the law in domestic violence cases." Finesmith, *supra* note 3, at 82 (footnote omitted). However, "[p]olicemen, whose decisions to respond to victims of crime and to invoke the criminal process largely determine the extent of law enforcement, pose the first and most critical barrier to access to the aid of the criminal law." Note, *The Case for Legal Remedies for Abused Women*, 6 N.Y.U. REV. L. & SOC. CHANGE 135, 144 (1977) [footnote omitted] [hereinafter cited as *Legal Remedies*].

9. See Finesmith, *supra* note 3, at 75.

10. See *id.*

11. See *id.* Those jurisdictions identified in the Finesmith survey as requiring the full enforcement of the law and the arrest of the wife batterer are: Barstow,

The typical police response to wife abuse is thus in conflict with some societal beliefs and preferences and differs sharply from the police response to other crimes.¹² Not unexpectedly, such police policies of nonenforcement of the law have often had painful consequences for the battered wife.¹³ The testimony of even a few of these victims makes for chilling reading.¹⁴

Los Angeles, and San Francisco, Cal.; Atlanta, Ga.; Normal, Ill.; Detroit, Mich.; Dayton, Ohio; Seattle and Spokane, Wash. *See id.* at 94 n.135. This policy is generally expressed in police regulations. *See id.* at 92-94.

12. *See id.* at 75.

13.

The police stand at the entrance to the justice system, and their actions often prevent or discourage battered women from pursuing criminal remedies against their abusers. Left unchecked, spouse abuse generally increases in severity as time passes, resulting in the victim's death in many cases. Where police policies and practices are based on misperceptions of domestic violence, officers are unlikely to respond effectively to battered women's calls for assistance, which perpetuates and reinforces the patterns of violence.

RULE OF THUMB, *supra* note 8, at 91.

14. The following are but three examples of many such cases.

A man grabs his wife by the throat and beats her; brandishes a straight razor and threatens her with it; tears her blouse off her body and gouges her face, neck, shoulders, and hands with his nails, in full public view. The police arrive but claim that they can take no action. Since this is a "family matter," she must go to family court. *Bruno v. Codd*, 90 Misc. 2d 1047, 1049, 396 N.Y.S.2d 974, 976 (Sup. Ct., Special Term, Part I 1977), *rev'd*, 64 A.D.2d 582, 407 N.Y.S.2d 165 (1st Dep't 1978), *aff'd*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979).

A woman suffers a beating at the hands of her husband. The police refuse to arrest the husband because the parties are married and instead refer them to family court where they speak with a probation officer. The probation officer insists that the parties go home and work things out, refusing to let the woman file a petition for an order of protection and see a judge, even though her husband brags, "She's my wife and I can do as I please." After the next beating, the woman calls the probation officer, who merely refers her back to the police, who again refuse to arrest her husband. Later the husband attacks her again—an assault so severe that she is beaten into unconsciousness—and once more she calls the police, who again refuse to arrest her husband and insist that they can take no action until she obtains an order of protection from family court. Finally, the woman is able to obtain the order, but her husband violates it by beating her, punching her in the face, and knocking her to the floor. Badly bruised and in great pain, the woman calls the police at once and shows them both her order of protection and her bruises. Once again they refuse to arrest her husband, tell her that she is not hurt, and recommend that she go back to family court. Complaint at 18-27, *Bruno v. Codd*, 90 Misc. 2d 1047, 396 N.Y.S.2d 974 (Sup. Ct., Special Term, Part I 1977); (cited in Woods, *supra* note 7, at 10 n.21).

A man slaps his wife and strikes her with a knife. A police officer arrives but refuses to arrest the husband. Instead, the policeman says to the husband, "Maybe if I beat my wife, she'd act right too." *Bruno v. Codd*, 90 Misc. 2d at 1050, 396 N.Y.S.2d at 977.

Clearly, the need to compel local police departments to better protect the abused wife exists in many jurisdictions.¹⁵ One possible method would be to launch an intensive campaign of lobbying and negotiation that would pressure a police department into formally adopting a more responsible policy,¹⁶ similar to the patrol guidelines recently adopted by the New York City Police Department, which mandate arrest in all felony assaults, in all misdemeanors where the victim wants an arrest, and in all misdemeanors when a crime is committed in front of the police officer.¹⁷ Perhaps a more realistic means would be to enact legislation that would either recognize explicitly that wife abuse is as serious a crime as any other type of criminal assault and should be punished or would mandate, under most circumstances, the arrest of the abusive husband.¹⁸ Yet official policies and existing laws are obviously only good to the extent they are en-

15. See Finesmith, *supra* note 3, at 75.

16. In Chicago, for example, the Chicago Police Department and attorneys representing battered women were able to negotiate a special order stating that "calls for services by females who have been the victim[s] of a battery or assault are not to be considered Domestic Disturbances. . . . An arrest should be made or warrant advised, if the preliminary investigation substantiates the allegation." Woods, *supra* note 7, at 31 n.156. A similar change in police arrest policy for married and unmarried battered women was achieved through negotiation by attorneys in New Haven, Connecticut. *Id.* However, it should be noted that both negotiations followed in the wake of the successful outcome of a New York lawsuit, *Bruno v. Codd*. *Id.*; see *infra* note 114.

17. See Greer, *City Police Have Changed Their Approach to Family Disputes*, N.Y. Times, Mar. 25, 1985, at B2, col. 2.

18. See Finesmith, *supra* note 3, at 87-109 for a thorough discussion of such legislation. Many states have already enacted statutes that provide for warrantless arrest based on probable cause in domestic violence cases or that impose duties on law enforcement officials handling disturbance calls. See ALASKA STAT. §§ 18.65.510(6)(b), 18.65.520 (1984 & Supp. 1985); ARIZ. REV. STAT. ANN. §§ 13.3601, 13.3602 (Supp. 1985); DEL. CODE ANN. tit. 13, § 1510 (1981); FLA. STAT. ANN. §§ 415.606, 901.15 (West Supp. 1985); HAWAII REV. STAT. § 709.906 (Supp. 1984); IDAHO CODE § 19-603 (Supp. 1985); ILL. ANN. STAT. ch. 85, § 507(a) (Smith-Hurd Supp. 1985); IOWA CODE ANN. §§ 236.11-.12 (West 1985); KY. REV. STAT. § 431.005 (1985); ME. REV. STAT. ANN. tit. 15, § 321, tit. 17-A, § 15(1)(A)(5-A), tit. 19, §§ 761-70 (Supp. 1985); MASS. ANN. LAWS ch. 276 (Michie/Law. Co-op. 1980); MICH. COMP. LAW ANN. § 764.15a (West 1982); MINN. STAT. ANN. § 629.341 (West Supp. 1985); N.H. REV. STAT. ANN. § 594:10(I)(b) (Cum. Supp. 1983); N.M. STAT. ANN. § 31-1-7 (1984); N.Y. CRIM. PROC. LAW § 530.11-.12 (McKinney 1984); N.Y. FAM. CT. ACT §§ 155, 168 (McKinney 1983); N.Y. JUD. LAW § 216 (McKinney 1983); N.C. GEN. STAT. §§ 50B-1 to -7 (1984 & Supp. 1985); N.D. CENT. CODE § 14-07.1-06 (Supp. 1983); OHIO REV. CODE ANN. §§ 109.73(A)(6), 2935.03(B) (Page 1982 & Supp. 1984); OR. REV. STAT. §§ 107.700-.720, 133.055, 133.310 (1984); R.I. GEN. LAWS § 11-5-9 (1981); TENN. CODE ANN. § 36-3-611 (1984); TEX. CODE CRIM. PROC. ANN. art. 14.03 (Vernon Supp. 1985); UTAH CODE ANN. §§ 30-6-1 to -8 (1984); WASH. REV. CODE ANN. §§ 10.99.010-.070 (1980 & Supp. 1985); WIS. STAT. ANN. § 165.85(4)(b) (West 1985).

forced.¹⁹ Probably the best way to ensure adequate police protection of battered wives would be to hold a city, and its police, liable for failure to meet the prescribed standard.²⁰ In those instances in which local or state law²¹ does not provide a sufficiently strong basis upon which to maintain such a suit, the equal protection clause of the fourteenth amendment might provide a basis for this action: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."²²

This Note supports holding a city and its police liable under the equal protection clause for the inadequate police protection of battered wives.²³ It first explores the question of the applicability of the equal protection clause to wife abuse cases by examining the clause's historical origin, as well as the gradual broadening of its legal scope.²⁴ It then discusses four legal approaches that might be used to establish equal protection violations in cases claiming inadequate police protection of battered wives.²⁵ This Note proceeds to analyze, in the context of the equal protection clause, the weaknesses and strengths of arguments that have been used in the past

19. See, e.g., *Nearing v. Weaver*, 295 Or. 702, 670 P.2d 137 (1983) (concerning failure of police to enforce Oregon's strong abuse prevention laws on behalf of battered wife).

20. However, the District of Columbia Court of Appeals, basing its decision on the district's common law, overturned a lower court decision upholding liability of the local police department in a case brought by a police officer's battered wife whose father was killed by her husband. *Morgan v. District of Columbia*, 468 A.2d 1306 (D.C. 1983).

21. Plaintiffs' claims in *Bruno v. Codd* were based on both local and state law. "The especially clear-cut nature of these claims, as compared with their federal counterparts, was an important factor entering into plaintiffs' decision to bring suit in state court rather than federal court." Woods, *supra* note 7, at 20-21. The local and state laws upon which the *Bruno* plaintiffs decided to base their claims were: 1 N.Y.C. Charter & Code § 435(a) (1976); 9 N.Y.C.R.R. pt. 354; 22 N.Y.C.R.R. §§ 2501-10; 22(c) N.Y.C.R.R. pt. 2508; N.Y. CRIM. PROC. LAW §§ 140.10, 140.40(1), (4) (McKinney 1971 & Supp. 1978-1979); N.Y. FAM. CT. ACT §§ 114, 115, 168, 811, 821 (McKinney 1975 & Supp. 1978-1979). See Woods, *supra* note 7, at 21-25. Principles of comity, federalism, and abstention also figured in plaintiffs' decision. See *id.* at 21. In contrast, however, local law failed to provide a sufficiently strong basis for the claims of the battered wife in *Morgan v. District of Columbia*. See *supra* note 20.

22. U.S. CONST. amend. XIV, § 1; see *infra* Sections II-III. For a thorough discussion and incisive analysis of legal approaches to the problem of wife abuse, see Marcus, *Conjugal Violence: The Law of Force and the Force of Law*, 69 CALIF. L. REV. 1657 (1981) [hereinafter cited as Marcus].

23. See *infra* Sections II-VI.

24. See *infra* Section II.

25. These four approaches are those that focus on the denial of fundamental rights, on suspect classes, on impermissible gender-based classifications, and on the lack of rational relationship to a legitimate state purpose. See *infra* section III.

to justify nonenforcement of the law by police in incidents involving wife abuse.²⁶ Upon asserting the strength of the equal protection argument in battered wife cases, this Note then recommends the approach that has been, and probably will continue to be, the most receptive approach to the courts.²⁷ This Note also stresses the need for serious judicial consideration of such actions,²⁸ and concludes by urging serious public consideration for the concept of using the courts as a means to compel the police to better protect battered wives.²⁹

II. The Applicability of the Equal Protection Clause to Wife Abuse Cases

It was the refusal of police officers to enforce the law and protect a certain class of citizens that led to the adoption of the fourteenth amendment's equal protection clause,³⁰ as well as the Civil Rights Act of 1871³¹ (section 1983). In the years following the Civil War, law enforcement officials in the South often turned a blind eye to assaults on blacks by members of the Ku Klux Klan.³² As one contemporary Congressman observed: "Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not. . . . In the presence of these gangs all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection."³³ The Supreme Court has asserted that the concern of Congress in passing section 1983 "was not the unavailability of state remedies but the failure of certain States to enforce the laws with an equal hand. . . . There was . . . no quarrel with the state laws on the books. It was their lack of enforcement that was the nub of the difficulty."³⁴ Clearly, when the drafters of the fourteenth amendment wrote that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws,"³⁵ they intended their words to be taken literally.³⁶

26. See *infra* Section IV.

27. See *infra* Section V.

28. See *id.*

29. See *infra* Section VI.

30. U.S. CONST. amend. XIV, § 1.

31. 42 U.S.C. § 1983 (1982).

32. See Woods, *supra* note 7, at 18.

33. CONG. GLOBE, 42d Cong., 1st Sess. app. 78 (1872) (cited in Woods, *supra* note 7, at 18).

34. Monroe v. Pape, 365 U.S. 167, 174, 176 (1961).

35. U.S. CONST. amend. XIV, § 1.

36. "The congressional debates on the Civil Rights Act make clear that the origin and most basic purpose of the 'equal protection' clause are to be found by

The equal protection clause remains applicable to discriminatory governmental action in administration and enforcement of the law.³⁷ In addition, police action is subject to the equal protection clause and to section 1983, whether that action takes the form of committing prohibited acts or of omitting to carry out acts that a police officer is required by duty to perform.³⁸ Moreover, although a municipality may not be held liable for the constitutional torts of its employees on respondeat superior grounds,³⁹ it may be sued for damages when the action that is alleged to be unconstitutional implements an official policy or unofficial "custom" of the municipality.⁴⁰

Originally, the application of the equal protection clause was limited to cases involving racial classification or racially motivated discrimination.⁴¹ With the passage of time, however, its purview came to include other classifications. Its authority has since been invoked to invalidate classifications based on: (1) alienage for the purpose of distribution of economic benefits that do not promote a compelling or overriding state interest;⁴² (2) classifications based on legitimacy at birth that are not related to a legitimate state interest;⁴³ (3) classifications based on gender that are not substantially related to an important governmental objective;⁴⁴ and, indeed, (4) any classification that is not rationally related to a legitimate governmental purpose.⁴⁵ It is therefore appropriate and proper that the

reference to the literal words of the amendment." Woods, *supra* note 7, at 18.

37. See, e.g., Yick Wo v. Hopkins, 118 U.S. 356 (1886); Britton v. Rogers, 631 F.2d 572, 577 (8th Cir. 1980), *cert. denied*, 451 U.S. 939 (1981); Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, 485 F. Supp. 400, 409 (N.D. Ill. 1980), *order rev'd on other grounds*, 639 F.2d 373 (7th Cir. 1981), *judgment rev'd on other grounds*, 455 U.S. 489 (1982).

38. See, e.g., Smith v. Ross, 482 F.2d 33, 36-37 (6th Cir. 1973); Byrd v. Brishke, 466 F.2d 6, 10 (7th Cir. 1972); Azar v. Conley, 456 F.2d 1382, 1387 (6th Cir. 1972).

39. See Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 691 (1978).

40. *Id.* at 690-91.

41. See Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873) ("We doubt very much whether any action of a State not directed by way of discrimination against the [N]egroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.").

42. See, e.g., *In re Griffiths*, 413 U.S. 717 (1973); Graham v. Richardson, 403 U.S. 365 (1971).

43. See, e.g., Pickett v. Brown, 462 U.S. 1 (1983); Mills v. Habluetzel, 456 U.S. 91, 97-99 (1982).

44. See, e.g., Craig v. Boren, 429 U.S. 190, 197 (1976); Reed v. Reed, 404 U.S. 71, 75-77 (1971).

45. See, e.g., San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 55

equal protection clause now be invoked to invalidate another discriminatory classification—based partly on gender and partly on marital status—that denies equal protection of the law and fundamental rights to battered wives,⁴⁶ bears no substantial relationship to an important governmental objective,⁴⁷ and probably has no rational relationship to any legitimate governmental purpose.⁴⁸ In a sense, the application of the equal protection clause to the inadequate police protection of battered wives marks a return to the clause's historical origin, for there is a striking analogy between the police failure to enforce the law to protect blacks and the failure of police to enforce the law to protect battered wives.⁴⁹

III. Establishing Equal Protection Violations in Wife Abuse Cases

Battered wives who bring suit against their city and local police departments on equal protection grounds must be able to satisfy certain factual and legal requirements that have been set forth in Supreme Court decisions.⁵⁰ First, plaintiffs must demonstrate through factual evidence that a policy or pattern of discriminatory police conduct exists.⁵¹ Second, they must establish, as a matter of law, that such discriminatory police conduct may be deemed a violation of the equal protection clause.⁵²

In a recently decided case, *City of Cleburne v. Cleburne Living Center*,⁵³ the Supreme Court set forth its current interpretation of the equal protection clause.⁵⁴ The import of the clause, the Court reasoned, is to direct that all persons similarly situated should be treated alike.⁵⁵ In the absence of congressional guidance, the courts

(1973); *Eisenstadt v. Baird*, 405 U.S. 438, 446-47 (1972).

46. See *infra* notes 76-103 and accompanying text.

47. See *infra* notes 104-31 and accompanying text.

48. See *infra* notes 132-37 and accompanying text.

49. "The analogy between police refusal to enforce the law to protect blacks and police refusal to protect battered women is clear. It gives powerful support to the claim that an arrest-avoidance policy denies battered women the equal protection of the laws." Woods, *supra* note 7, at 18.

50. See *infra* notes 51-75 and accompanying text.

51. See, e.g., *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-68 (1977); *Washington v. Davis*, 426 U.S. 229, 239 (1976); *Rizzo v. Goode*, 423 U.S. 362, 371 (1976).

52. See, e.g., *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3254-55 (1985); *Plyler v. Doe*, 457 U.S. 202, 216 (1982); *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982).

53. 105 S. Ct. 3249 (1985).

54. *Id.* at 3254-55.

55. See *id.* at 3254; *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

themselves have developed standards for judging the constitutionality of state statutes or other state actions under the equal protection clause.⁵⁶ Generally, courts have sustained legislation "if the classification drawn by the statute is rationally related to a legitimate state interest."⁵⁷ The latitude allowed to the states is especially wide when a social or economic statute is involved,⁵⁸ for it is the presumption of the Constitution that the democratic process will ultimately rectify even improvident decisions.⁵⁹

However, there are important exceptions to the general rule. The Court noted in *Cleburne* that this principle is not applied when a statutory classification is based on race, alienage, or national origin.⁶⁰ Such factors are rarely pertinent to the attainment of a legitimate state interest; therefore, laws based on such factors are generally considered to be reflections of prejudice and bigotry.⁶¹ "For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest."⁶² Judicial "strict scrutiny" is also triggered by cases claiming the denial of fundamental rights: "Similar oversight by the courts is due when state laws impinge on personal rights protected by the Constitution."⁶³

Significantly, the Court stated in *Cleburne* that gender-based legislative classifications "also call for a heightened standard of re-

56. 105 S. Ct. at 3254.

57. *Id.*; see *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 174-75 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

58. 105 S. Ct. at 3254; see *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. at 175 ("In . . . recent years, . . . the Court in cases involving social and economic benefits has consistently refused to invalidate on equal protection grounds legislation which it simply deemed unwise or unartfully drawn."); *City of New Orleans v. Dukes*, 427 U.S. at 303-04 ("When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. . . . States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. . . . [I]n the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.").

59. See 105 S. Ct. at 3254.

60. *Id.* at 3255.

61. *Id.*

62. *Id.*; see *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964).

63. 105 S. Ct. at 3255; see *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

view. . . . '[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.'"⁶⁴ Laws that discriminate between the sexes in the distribution of benefits and burdens most likely depend not on legitimate factors but rather on "outmoded notions of the relative capabilities of men and women."⁶⁵ While the judicial standard used is not that of strict scrutiny, a classification based on gender must fail unless it bears a substantial relationship to a "sufficiently important governmental interest."⁶⁶

Another suspect classification, official discrimination based on illegitimacy, has become the subject of "somewhat heightened review."⁶⁷ The Court, however, has refused to recognize either the aged⁶⁸ or the mentally retarded⁶⁹ as a suspect class.⁷⁰ The Court has held that in these kinds of cases, the equal protection clause only

64. 105 S. Ct. at 3255 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion)).

65. *Id.*

66. *Id.*; see *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-25 (1982); *Craig v. Boren*, 429 U.S. 190, 197-98 (1976). The Court has defined its heightened standard of review for gender-based classifications in this way:

Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate. . . .

If the State's objective is legitimate and important, we next determine whether the requisite direct, substantial relationship between objective and means is present. The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women. The need for the requirement is amply revealed by reference to the broad range of statutes already invalidated by this Court, statutes that relied upon the simplistic, outdated assumption that gender could be used as a "proxy for other, more germane bases of classification," *Craig v. Boren*, 429 U.S. 190, 198 (1976), to establish a link between objective and classification.

Mississippi Univ. for Women v. Hogan, 458 U.S. at 724-26 (footnotes omitted).

67. 105 S. Ct. at 3255; see *Mills v. Habluetzel*, 456 U.S. 91, 98-99 (1982); *Mathews v. Lucas*, 427 U.S. 495, 505-06 (1976).

68. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976).

69. 105 S. Ct. at 3255-58.

70. Thus, these groups are not protected through strict or heightened review. See *id.* at 3255.

requires that the classification be "a rational means to serve a legitimate end."⁷¹

Thus, there are four possible grounds upon which a battered wife could base a suit to challenge a city and its police under the equal protection clause. She could allege that a policy or pattern of inadequate police protection exists that is: (1) an infringement of a fundamental right and is not suitably tailored to serve a compelling state interest;⁷² (2) directed at a truly suspect class;⁷³ (3) directed against women and is not substantially related to a sufficiently important governmental interest;⁷⁴ and/or (4) not rationally related to any legitimate state interest.⁷⁵

A. Fundamental Rights

The strongest approach a battered wife can take is to successfully prove to the court that the rights being denied her are fundamental.⁷⁶ Once this view of the law is accepted, the defendants' behavior becomes subject to strict judicial scrutiny and will be ruled unconstitutional unless it is suitably tailored to serve a compelling state interest.⁷⁷

Thus, a battered wife might argue that by being denied access to police protection, she has been deprived of a fundamental right.⁷⁸ However, it must also be noted that thus far the Supreme Court has not characterized such access as a fundamental right.⁷⁹ This may well be a matter of historical accident; the Supreme Court has had occasion to reject the claim of a constitutional right to compensation with regard to a particular failure to provide police protection,⁸⁰ but the Court has never dealt with the issue of the denial of police protection on the basis of a broad classification.⁸¹ It should be recalled in this context that in *San Antonio Independent School District v. Rodriguez*,⁸² where appellees raised the issue of the right to education, the Court raised the possibility that had the appellees

71. *Id.*

72. See *infra* notes 76-89 and accompanying text.

73. See *infra* notes 90-103 and accompanying text.

74. See *infra* notes 104-31 and accompanying text.

75. See *infra* notes 132-37 and accompanying text.

76. See *supra* note 63 and accompanying text.

77. See *supra* note 62 and accompanying text.

78. See Marcus, *supra* note 22, at 1666.

79. See *id.*

80. See *YMCA v. United States*, 395 U.S. 85 (1969).

81. See Marcus, *supra* note 22, at 1666.

82. 411 U.S. 1 (1973).

shown "an absolute denial of educational opportunities," the Court might have found an interference with fundamental rights.⁸³ Consequently, a case involving the complete or near-complete denial of police protection to battered wives could well move a court to find the deprivation of a fundamental right.⁸⁴ Until such a claim actually comes before a court, however, the argument will remain simply a promising theory.

A battered wife might also maintain that the denial of access to the courts—through the refusal of police to take legal action against the battering husband—constitutes the violation of a fundamental right.⁸⁵ This approach also is problematic. While such a right of access has been recognized in civil cases where only a judicial proceeding can effectively resolve a dispute,⁸⁶ the right has thus far been limited in criminal cases to ensuring only that basic trial and appellate procedures do not discriminate against certain classes of defendants.⁸⁷

Certainly an argument for a more expansive application of the right to court access can be made in criminal cases involving wife abuse. It could well be argued that for battered wives seeking to press criminal charges against their battering husbands—just as in civil cases where a judicial proceeding is the only effective means of dispute resolution—resort to the judicial process is, practically speaking, no more voluntary than it is for defendants called upon to defend their interests in court. For both groups the court is more than the best forum for the settlement of their disputes—it is the only available one. As persons forced to settle their claims of right through the judicial process, battered wives should be given a meaningful opportunity to be heard under basic due process principles.⁸⁸ The argument is an attractive one, but until it is actually raised in court, it too must remain no more than a promising theory.

There is one more argument that deserves to be considered on behalf of the proposition that a battered wife being denied adequate police protection is being deprived of a fundamental right:

83. See *id.* at 36-37; Marcus, *supra* note 22, at 1666 n.37.

84. Cf. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. at 36-37 (analogous denial of education).

85. See Marcus, *supra* note 22, at 1666.

86. See *Boddie v. Connecticut*, 401 U.S. 371, 375-76 (1971); Marcus, *supra* note 22, at 1666-67.

87. See *Griffin v. Illinois*, 351 U.S. 12, 18 (1956); Marcus, *supra* note 22, at 1667.

88. See *Boddie v. Connecticut*, 401 U.S. at 376-77.

[I]t is anomalous to conclude that governmental services vital to our physical security should be put into the same category as granting a driver's license. Blackstone's classic analysis of the rights of individuals gave the highest priority to protection from murder or mutilation and "security from the corporal insults of menaces, assaults, beating and wounding."⁸⁹

B. Suspect Class

Another possible approach that one might take would be to present the battered wife as a member of a suspect class. This approach would justify the invocation by the court of a standard of strict, or at least heightened, judicial scrutiny.⁹⁰ A plaintiff would have to show that battered wives, as a class, possess "the traditional indicia of suspectness,"⁹¹ i.e., battered wives are "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."⁹²

One could argue that each of these indicia is present in the class of battered wives, for they have suffered not only the physical abuse of their husbands, but also the neglect of law enforcement personnel due to traditional stereotypes and prejudices,⁹³ and have been powerless to protect themselves.⁹⁴ But this argument, despite its merits, may have been undermined by the Supreme Court's decisions in *Massachusetts Board of Retirement v. Murgia*⁹⁵ and, more recently, in *Cleburne*.⁹⁶

89. Marcus, *supra* note 22, at 1667 (quoting 1 W. BLACKSTONE, COMMENTARIES *134) (footnote omitted).

90. See *supra* notes 60-62, 64-67 and accompanying text.

91. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. at 28.

92. *Id.* For cases in which the Court recognized a class as suspect based on the burden of disabilities of the class, its history of suffering deliberate unequal treatment, and its position of political powerlessness, see Mathews v. Lucas, 427 U.S. 495 (1976) (illegitimacy); Frontiero v. Richardson, 411 U.S. 677 (1973) (gender); Graham v. Richardson, 403 U.S. 365 (1971) (alienage); McLaughlin v. Florida, 379 U.S. 184 (1964) (race); Oyama v. California, 332 U.S. 633 (1948) (national origin).

93. See *infra* notes 135-45 and accompanying text. It has been suggested that classifications that are probably based on stereotypes should be treated with special suspicion. See Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 933 (1973).

94. See Eisenberg & Micklow, *supra* note 1, at 141-45.

95. 427 U.S. 307 (1976).

96. 105 S. Ct. 3249 (1985).

In *Murgia*, the Court declined to recognize a suspect class based on age. While the Court acknowledged that there has been discrimination against the aged, the Court also found that the aged have not experienced a " 'history of purposeful unequal treatment' " like that suffered by those who have been discriminated against on the basis of race or national origin, nor have the aged been subjected to special disabilities based on stereotypes not truly indicative of their disabilities.⁹⁷

Similarly, in *Cleburne*, the Court held that the mentally retarded do not constitute a suspect class. While recognizing that the mentally retarded have been, and will continue to be, the victims of "instances" of invidious discrimination,⁹⁸ the Court noted that there are legitimate reasons for the government to single out the mentally retarded for special treatment.⁹⁹ Moreover, the Court declared, the distinctive and sympathetic legislative response to the plight of the mentally retarded contradicts the allegation that the mentally retarded are politically powerless, for they have the ability to attract the attention of the legislators.¹⁰⁰ The Court also evinced a strong reluctance to enlarge the category of the suspect class:

[I]f the large and amorphous class of the mentally retarded were deemed quasi-suspect . . . , it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.¹⁰¹

One can, of course, distinguish between battered wives and the mentally retarded, "the aging, the disabled, the mentally ill, and the infirm." One can maintain that the disabilities and historical maltreatment suffered by battered wives are very much like those suffered by persons on the basis of race or national origin,¹⁰² and that the legislative response to the plight of the battered wife has

97. 427 U.S. at 313.

98. 105 S. Ct. at 3258.

99. *Id.* at 3256-57.

100. *See id.* at 3257.

101. *Id.* at 3257-58.

102. *See supra* notes 1-13 and accompanying text. As with persons persecuted on the basis of race or national origin, battered wives historically have been subjected to physical violence that they generally have been powerless to resist and that the authorities generally have been reluctant to punish and prevent.

been of limited effectiveness due to nonenforcement.¹⁰³ Nonetheless, in view of *Murgia* and *Cleburne* and the Supreme Court's hesitation to recognize new suspect classes, a plaintiff would be wise to use the approach of the suspect class only as a supplement to another approach.

C. Gender-Based Classification

It is logical to assume from *Cleburne*¹⁰⁴ and cases cited therein¹⁰⁵ that when a court is convinced that a policy or pattern of inadequate police protection of battered wives results from an impermissible gender-based classification, it will subject the defendants' actions to an intermediate, but still searching, level of judicial scrutiny.¹⁰⁶ This was the approach taken in *Thurman v. City of Torrington*,¹⁰⁷ a seminal case in its application of the equal protection clause to the claim of inadequate police protection of abused wives. In *Thurman*, the court viewed the alleged behavior of the defendant city and police officers as a clear consequence of a sex-based classification. "If the City wishes to discriminate against women who are victims of domestic violence," wrote the court, "it must articulate an important governmental interest for doing so."¹⁰⁸

Recalling the old common law " 'right of husbands to physically discipline their wives,' "¹⁰⁹ the *Thurman* court deemed any present-day version of this concept "an 'increasingly outdated misconception,' "¹¹⁰ which must be rejected as unconstitutional.¹¹¹ The court

103. See *supra* note 19 and accompanying text.

104. 105 S. Ct. 3249 (1985).

105. *Id.* at 3255 (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Craig v. Boren*, 429 U.S. 190 (1976)).

106. See *supra* notes 64-66 and accompanying text.

107. 595 F. Supp. 1521 (D. Conn. 1984). In *Thurman v. City of Torrington*, a woman and her son brought a civil rights action against the City of Torrington, Conn., and its police officers, alleging that plaintiffs' constitutional rights were violated by the police officers' malperformance of official duties with regard to assaults committed by the woman's husband. On the City's motion to dismiss the complaint, the court held that plaintiffs stated a violation of the equal protection clause (thus precluding dismissal of the complaint) where they alleged that the police consistently and systematically provided substandard protection to victims of domestic violence. *Id.* at 1527.

108. *Id.* at 1527.

109. *Id.* at 1528 (quoting *Finesmith*, *supra* note 3, at 79).

110. *Id.* (quoting *Craig v. Boren*, 429 U.S. at 198-99).

111.

As such it must join other "archaic and overbroad" premises which have been rejected as unconstitutional. *Crawford v. Cushman*, 531 F.2d

observed that "[a] man is not allowed to physically abuse or endanger a woman merely because he is her husband."¹¹² Citing *Bruno v. Codd*,¹¹³ another important wife abuse case,¹¹⁴ the *Thurman* court extended this principle to the duty of the police and ruled that concomitantly, "a police officer may not knowingly refrain from interference in such violence, and may not 'automatically decline to make an arrest [solely] because the assaulter and his victim are married to each other.'"¹¹⁵ The court labeled such police inaction "a denial of the equal protection of the laws."¹¹⁶ In response to the familiar policy of discouraging police intervention in intrafamily disputes,¹¹⁷ the *Thurman* court quoted the Supreme Court's dictum in *Reed v. Reed*¹¹⁸ that " 'whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.' "¹¹⁹

1114 (2d Cir. 1976) (rejecting the notion that pregnancy renders servicewomen unfit and requires discharge); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643, 95 S. Ct. 1225, 1230, 43 L. Ed. 2d 514 (1975) (rejecting proposition that the earnings of female wage earners do not significantly contribute to their families' support); *Frontiero v. Richardson*, 411 U.S. 677, 689, 93 S. Ct. 1764, 1771, 36 L. Ed. 2d 583 (1973) (rejecting assertion that female spouses of servicemen would normally be dependent upon their husbands while male spouses of servicewomen would not be dependent upon their wives); *Stanton v. Stanton*, 421 U.S. 7, 14-15, 95 S. Ct. 1373, 1377-1378, 43 L. Ed. 2d 688 (1975) (rejecting "old notion" that the female is destined solely for the home and the rearing of the family and the male only for the marketplace and the world of ideas).

Thurman, 595 F. Supp. at 1528.

112. *Id.*

113. 90 Misc. 2d 1047, 396 N.Y.S.2d 974 (Sup. Ct., Special Term, Part I 1977), *rev'd on other grounds*, 64 A.D.2d 582, 407 N.Y.S.2d 165 (1st Dep't 1978), *aff'd*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979).

114. In *Bruno v. Codd*, twelve battered wives in New York City, suing on behalf of themselves and all other battered wives similarly situated, alleged that the New York City Police Department, the New York City Department of Probation, and the clerks of the New York Family Court engaged in a pervasive pattern and practice of denying abused wives the legal protection and assistance to which they were entitled under city and state law. For a detailed discussion of this pioneering case by one of the plaintiffs' attorneys, see Woods, *supra* note 7, at 15-33.

115. 595 F. Supp. at 1528 (quoting *Bruno v. Codd*, 90 Misc. 2d at 1049, 396 N.Y.S.2d at 976).

116. *Id.*

117. See *supra* notes 8-14 and accompanying text.

118. 404 U.S. 71 (1971).

119. *Thurman*, 595 F. Supp. at 1529 (quoting *Reed v. Reed*, 404 U.S. at 76-77). The *Thurman* court also noted:

any notion that defendants' practice can be justified as a means of promoting domestic harmony by refraining from interference in marital disputes, has no place in the case at hand. Rather than evidencing a

In view of *Craig v. Boren*,¹²⁰ *Mississippi University for Women v. Hogan*,¹²¹ and, most recently, *Cleburne*,¹²² it is reasonable to assume that the approach used in *Thurman*—of challenging the inadequate police protection of battered wives as the result of an impermissible gender-based classification—is a very sound one. It is important to remember, however, that the intermediate standard of review applied by the Supreme Court in gender discrimination cases has often had an uncertain, even “ad hoc” quality about it.¹²³ The Court has upheld gender-based classifications when it believed that the classification reasonably advanced a significant state interest.¹²⁴ Thus, the Court has upheld differentiations between the rights of mothers and fathers of illegitimate children to bring a wrongful death action;¹²⁵ a statutory rape law that punished only adult men;¹²⁶ the exemption of women from military draft registration;¹²⁷ and the exclusion from employee benefits of insurance payments for costs related to pregnancy.¹²⁸ Even in *Mississippi University for Women*, the Court was unwilling to take a stand against the dispensation of educational benefits on the basis of gender.¹²⁹

Nonetheless, the necessity of showing a substantial relationship to a sufficiently important government interest remains the Supreme Court’s standard of review for gender-based classifications.¹³⁰ As long as battered wives who use the gender-based classification approach come prepared to rebut attempts to show that such a relationship exists,¹³¹ the approach will remain a highly effective one.

desire to work out her problems with her husband privately, [plaintiff] pleaded with the police to offer her at least some measure of protection. Further, she sought and received a restraining order to keep her husband at a distance.

Id. (footnote omitted).

120. 429 U.S. 190 (1976).

121. 458 U.S. 718 (1982).

122. 105 S. Ct. 3249 (1985).

123. See J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 713-31 (2d ed. 1983).

124. See *infra* notes 125-29 and accompanying text.

125. *Parham v. Hughes*, 441 U.S. 347 (1979).

126. *Michael M. v. Superior Court*, 450 U.S. 464 (1981).

127. *Rostker v. Goldberg*, 453 U.S. 57 (1981).

128. *Geduldig v. Aiello*, 417 U.S. 484 (1974), *superseded by* 42 U.S.C. § 2000e(k) (1982).

129. 458 U.S. at 723 n.7.

130. See *supra* notes 64-66 and accompanying text.

131. See *infra* notes 138-67 and accompanying text.

D. Lack of Rational Relationship

Even the least stringent level of judicial scrutiny under the equal protection clause would require that any police policy or pattern of conduct that denies equal protection of the law to battered wives bear a rational relationship to a legitimate state goal.¹³² Professor Tribe has explained this basic requirement of minimum rationality, pointing out that the Supreme Court has always perceived in the equal protection clause a requirement that legislative and administrative classifications be reasonable. The Court has tested this "rationality" by the classification's ability to fulfill the purpose intended by the rule.¹³³ In addition, the purpose of the rule must be a legitimate one based on some conception of the public good.¹³⁴ However, requiring the existence of a rational relationship to a legitimate state goal has not led to a careful scrutiny of public purposes. Instead, courts have traditionally shown a great deal of deference to the legislative definition of "the general good," whether out of sympathy for the difficulties of the legislative process or out of a general belief in judicial restraint.¹³⁵

Because of this judicial policy of leniency in examining legislative purposes, a battered wife seeking to prove a violation of the equal protection clause would be wise to argue lack of rational relationship in conjunction with other arguments, lest a deferential court manage to find some "rationality" in a police department's policy of non-enforcement of the law with regard to battered wives. However, a strong argument may be made that no rationality can ever be found for such a policy, at least in a large number of wife abuse cases.¹³⁶ Moreover, it is important to note that if a policy of arrest-avoidance is unwritten, or written only in the police department's administrative documents, the claim of a legitimate state interest is weakened considerably, for the defendants would be unable to cite any piece of state legislation in justification of the policy.¹³⁷

IV. Attempts to Justify Police Nonenforcement Policies in Wife Abuse Cases

Is it possible to show some justification for a police department's policy of nonenforcement of the law in wife abuse cases? Repeated

132. See *supra* note 57 and accompanying text.

133. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-2, at 994-95 (1978).

134. *Id.* at 995.

135. See *id.*; *supra* notes 56-59 and accompanying text.

136. See *infra* notes 149-67 and accompanying text.

137. See Woods, *supra* note 7, at 19.

attempts to do so certainly have been made.¹³⁸ The many rationalizations include preserving the traditional "principle" that "a man's home is his castle;"¹³⁹ avoiding arrest in situations in which the physical abuse of a woman by her husband is purported to be acceptable within the couple's culture;¹⁴⁰ and maintaining the efficient and economic administration of the state's law enforcement agencies by regarding wife battering as a minor crime and the arrest of wife batterers as a low priority.¹⁴¹ Other rationalizations have been: (1) avoiding arrest in a class of cases that is alleged to have a high complainant attrition rate;¹⁴² (2) avoiding arrest in situations in which the family could ill afford the economic impact of the husband's arrest (e.g., time lost from work);¹⁴³ (3) respecting a couple's privacy by not interfering in private marital matters;¹⁴⁴ and (4) preventing the possibility of harm to police officers who might be injured in attempting to arrest a violent husband.¹⁴⁵ Further attempts at justification include preventing the possibility of severe retaliation against the battered wife by the arrested husband after his release;¹⁴⁶ avoiding arrest in situations in which the battered wife merely wants to frighten the husband, remove him from the home, or be transported to the hospital;¹⁴⁷ and preserving the marriage and family, which could be endangered by the intervention of the criminal justice process.¹⁴⁸

None of these policies can truly justify nonenforcement of the law by police departments in wife abuse cases. Few of these explanations would be a valid reason for a police officer's failure to arrest an assailant if the assault were committed by a stranger.¹⁴⁹

138. See Finesmith, *supra* note 3, at 85-86; Parnas, *The Police Response to the Domestic Disturbance*, 1967 WIS. L. REV. 914, 930-31 [hereinafter cited as Parnas]; Woods, *supra* note 7, at 19; *Legal Remedies*, *supra* note 8, at 169.

139. See Finesmith, *supra* note 3, at 86; Marcus, *supra* note 22, at 1660; Parnas, *supra* note 138, at 931.

140. See Finesmith, *supra* note 3, at 85; Parnas, *supra* note 138, at 930.

141. See *Legal Remedies*, *supra* note 8, at 169.

142. See Finesmith, *supra* note 3, at 86; Marcus, *supra* note 22, at 1673; Parnas, *supra* note 138, at 931; Woods, *supra* note 7, at 19.

143. See Finesmith, *supra* note 3, at 85; Marcus, *supra* note 22, at 1670; Parnas, *supra* note 138, at 930.

144. See Marcus, *supra* note 22, at 1660; *Legal Remedies*, *supra* note 8, at 169.

145. See Marcus, *supra* note 22, at 1671; Woods, *supra* note 7, at 19; *Legal Remedies*, *supra* note 8, at 169.

146. See Finesmith, *supra* note 3, at 85; Parnas, *supra* note 135, at 931; *Legal Remedies*, *supra* note 8, at 169.

147. See Finesmith, *supra* note 3, at 85; Parnas, *supra* note 135, at 930.

148. See Finesmith, *supra* note 3, at 85-86; Marcus, *supra* note 22, at 1669; Parnas, *supra* note 138, at 931; Woods, *supra* note 7, at 19; *Legal Remedies*, *supra* note 8, at 169.

149. See Finesmith, *supra* note 3, at 86.

Most of these justifications can be quickly dismissed. Any "principle," no matter how hoary with antiquity, that permits, for any reason, a woman to be physically abused by a man, simply because they are married to one another, is unacceptable morally, legally, and constitutionally.¹⁵⁰ The same may be said of any "cultural tradition" that allegedly condones wife abuse, a rationalization that smacks of prejudice and may, under certain circumstances, trigger the strict judicial scrutiny appropriate to cases involving racial classifications.¹⁵¹ It is highly unlikely that a court would openly and officially accept a policy that ignores the crime of wife beating in order to save the state some time and money.¹⁵² It has not been proven that there is a higher complainant attrition rate in wife battering cases than in other cases involving violence between acquaintances¹⁵³ and, in any event, an arrest serves the independent function of protecting the victim from immediate future harm—protection that is crucial for a victim as helpless as a battered wife.¹⁵⁴ There is no reason that the economic impact of an arrest on an assailant's family should figure more prominently in a wife battering case than in an ordinary assault case.¹⁵⁵ A crime committed by one spouse against the other can hardly be deemed a matter of marital privacy.¹⁵⁶ Moreover, if one accepts the argument that a police officer ought not attempt to arrest a wife batterer lest his action place him in danger, one should logically bar a police officer from all duties that might place him in danger.¹⁵⁷

150. See *Thurman v. City of Torrington*, 595 F. Supp. at 1528.

151. See *supra* notes 60-62 and accompanying text; Finesmith, *supra* note 3, at 86.

152. Cf. *Legal Remedies*, *supra* note 8, at 169-70 (arguing that "the state's interest in the life, liberty, and safety of abused women is far more substantial" than such considerations as saving the state some time and money).

153. See Woods, *supra* note 7, at 20. Moreover, "in some of the jurisdictions where prosecutors have treated interspousal attacks as crimes against the state and were firm in pursuing them, the complaining witnesses cooperated in more than ninety percent of the cases where charges were filed." Marcus, *supra* note 22, at 1680 (footnote omitted).

154. See Woods, *supra* note 7, at 20.

155. See Finesmith, *supra* note 3, at 85-86; Marcus, *supra* note 22, at 1671.

156. See Marcus, *supra* note 22, at 1661-63, 1668-70; *Legal Remedies*, *supra* note 8, at 169.

157.

[I]f it is true that the rate of police injuries in domestic assault cases is high, that problem can be addressed by special police training programs. It is hardly a justification to refuse to protect defenseless women from husbands who are usually stronger than they are, to claim that domestic assault situations are too dangerous for fully armed and trained police officers.

The attempted justification of preventing the possibility of severe retaliation against the battered wife by the arrested husband after his release is worthy of more attention. However, this remains a highly dubious rationalization for several reasons. First, the possibility of retaliation may be precluded altogether if there exist local shelters for battered wives, or other means for the victimized woman to leave her home once her husband has been arrested.¹⁵⁸ If such is the situation, this attempted justification vanishes entirely. Second, an abusive husband whose wife has unsuccessfully tried to have him arrested may well be at least as likely to retaliate as is an abusive husband who has actually been arrested.¹⁵⁹ Indeed, he is perhaps more likely to retaliate, for the police officer's refusal to arrest him may lead the abusive husband to believe—not without cause—that he may retaliate with impunity.¹⁶⁰ Third, it can be strongly argued that the arrest of abusive husbands overwhelmingly serves to discourage the crime of wife battering rather than to promote retaliation.¹⁶¹ As one expert in the area of wife abuse cases has observed:

Since the concomitant results of arrest (e.g., publicity, embarrassment, and loss of time from work) are generally difficult and unpleasant, certainty of arrest following spouse abuse may perform a deterrent function. In fact, arrest may be even more effective in the marital violence context than in others, as most battering men probably do not view themselves as habitual criminals for whom arrest is an expected event. Rather, they are likely to see themselves as law-abiding citizens for whom arrest is unusual and frightening. For that reason, it is possible that arrest is more likely to affect their views of themselves and hence, their subsequent behavior.¹⁶²

Woods, *supra* note 7, at 20; *see also* Marcus, *supra* note 22, at 1672-73 (footnotes omitted) ("While reduction of risk to police personnel must be a continuing governmental objective, it cannot be accomplished merely by writing off one group of victims as too undeserving to warrant such a risk. Rather, the state should provide well-designed training programs to assist officers in utilizing crisis prevention techniques and distinguishing between those cases necessitating only mediation and those requiring investigation and arrest."); *Legal Remedies*, *supra* note 8, at 169 (footnote omitted) ("By training police officers to handle violent situations which involve people who know or are married to each other, harm to police officers would be reduced without penalizing this class of female assault victims").

158. *See* RULE OF THUMB, *supra* note 8, at 96.

159. *See* Woods, *supra* note 7, at 12-13.

160. *See id.*

161. *See id.*; Finesmith, *supra* note 3, at 102-05.

162. Finesmith, *supra* note 3, at 104. The argument that arrest serves to discourage wife abuse rather than promote retaliation is supported by a study conducted in

Situations in which the battered wife merely wants to frighten the husband, remove him from the home, or be transported to the hospital, are unique situations that properly call for the use of the police officer's discretion.¹⁶³ They are completely removed from situations in which a battered wife fully desires and expressly requests her abusive husband's arrest.¹⁶⁴ An oft-cited attempt at justification for avoiding the arrest of wife batterers is the preservation of the marriage and family.¹⁶⁵ However, the violence may have already destroyed the marriage and irrevocably torn apart the family.¹⁶⁶ If such is the situation, then the attempted justification does not exist at all. In other situations, it is wise to consider the response of an attorney who has for years been a leader in the struggle for the legal rights of the battered wife:

[E]ven if the arrest-avoidance policy actually furthers that goal, [it] is simply an insufficient justification for allowing women to suffer injuries at the hands of their violent husbands. Less drastic alternatives are available to preserve the family after the arrest and removal of the assailant. Moreover, it can certainly be argued that the family is best preserved not by avoidance of arrest but rather by arrest: that women are forced to leave their husbands because the law of law enforcement leaves the women no alternative, while arrest might lead to the cessation of the violence, with the result of the family staying together. Finally, there should not be any state interest in preserving a family which is a haven for unchecked violence.¹⁶⁷

Minneapolis during 1982 by the Police Foundation. An executive summary of the study's preliminary experimental findings stated that "arrested subjects [battering spouses] manifested significantly less violence [e.g., recidivism] than those who were ordered to leave [the scene of the violence], and less violence than those who were advised [e.g., counseled] but not separated." *Id.* at 101 n.174 (quoting L. SHERMAN & R. BERK, POLICE RESPONSES TO DOMESTIC ASSAULT: PRELIMINARY FINDINGS (AN EXECUTIVE SUMMARY) 1 (1983)). Such findings buttress the theory that the arrest of wife batterers generally discourages continued violence against battered wives, whether of a retaliatory or nonretaliatory nature.

163. "[I]t might be appropriate to honor a battered woman's request to have an abuser removed from the house without filing charges" Finesmith, *supra* note 3, at 86.

164. See *supra* note 119.

165. See *supra* note 148 and accompanying text.

166. See *Legal Remedies*, *supra* note 8, at 169; cf. Marcus, *supra* note 22, at 1669 (footnote omitted) ("The argument that the state cannot protect a domestic assault victim because of the sanctity of marriage is uncomfortably reminiscent of the plea of the patricide that he should be exempt from prosecution because he is an orphan. It is the violence, not the cessation of violence, which threatens the family.").

167. Woods, *supra* note 7, at 20.

V. Recommendation

It is clear that there are strong grounds upon which a city and its police may be held liable under the equal protection clause for the inadequate police protection of battered wives.¹⁶⁸ Plaintiffs would have a variety of potentially successful approaches from which to choose, ranging from the claim of the denial of fundamental rights, which could trigger strict judicial scrutiny,¹⁶⁹ to the contention of a suspect class, which could invoke strict, or at least heightened, scrutiny,¹⁷⁰ to the allegation of an impermissible gender-based classification, with its intermediate level of judicial scrutiny,¹⁷¹ to the argument that inadequate police protection lacks a rational relationship to any legitimate state purpose.¹⁷²

Any good legal strategy would incorporate elements of all four approaches, for, to paraphrase the Bible, a fourfold cord is not quickly broken.¹⁷³ The best strategy, however, would focus on the allegation of an impermissible gender-based classification. This was the approach that proved to be successful in the seminal inadequate protection case of *Thurman v. City of Torrington*¹⁷⁴ and probably will continue to be successful in court. It is easy to see why. Such an approach does not call upon a court to find a fundamental right has been denied,¹⁷⁵ nor to recognize a new suspect class,¹⁷⁶ nor to rule out entirely any possibility of rationality.¹⁷⁷ This approach simply asks the court to acknowledge what few in modern society would dispute: that the inadequate police protection of battered wives is a classification based on gender that does not bear a substantial relationship to a sufficiently important governmental interest.¹⁷⁸

168. See *supra* Section III.

169. See *supra* notes 76-89 and accompanying text.

170. See *supra* notes 90-103 and accompanying text.

171. See *supra* notes 104-31 and accompanying text.

172. See *supra* notes 132-37 and accompanying text.

173. See *Ecclesiastes* 4:12.

174. See *supra* notes 107-19 and accompanying text.

175. See *supra* notes 79-88 and accompanying text for a discussion of the potential problems of using a fundamental rights approach. It is worth noting that the *Thurman* court, although a trailblazer in many ways, did not raise the possibility that the rights denied plaintiff were fundamental. See *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984).

176. See *supra* notes 97-101 and accompanying text for evidence of the Supreme Court's reluctance to recognize new suspect classes.

177. See *supra* notes 56-59, 135 and accompanying text for a discussion of the traditional judicial reluctance to find legislation or administrative procedures devoid of any rational purpose.

178. See *Thurman v. City of Torrington*, 595 F. Supp. at 1527-29; *supra* notes 107-31 and accompanying text.

However the issue is presented, there exists the need for serious judicial consideration of actions that challenge the inadequate police protection of abused wives. Given the heavy social¹⁷⁹ and legal¹⁸⁰ significance of such actions, it is reasonable to assume that many courts will follow the lead of *Thurman* and accept these claims.

VI. Conclusion

The concept of using the equal protection clause to hold a city and its police liable for the inadequate police protection of battered wives is very new. To date it has been employed in only one case. Yet, the success of this concept in *Thurman*, and the strengths of its four bases, augur well for its future application. Battered wives and their advocates should seriously consider using the equal protection clause as a means of compelling the local authorities to provide them with the police protection that every citizen deserves.

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179. See *supra* notes 2-4 and accompanying text.

180. See *supra* notes 5-22 and accompanying text.